IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

THE WALLACE CORPORATION,
Petitioner,

vs.

No. 927.

NATIONAL LABOR RELATIONS BOARD.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Fourth Circuit.

PETITIONER'S REPLY BRIEF.

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Petitioner respectfully submits the following reply to the brief of the National Labor Relations Board filed in opposition to this application for a writ of certiorari.

UNIQUE ISSUES IN THIS CASE.

The two main issues in this case, as stated by the Board and Petitioner alike, are unique. Neither issue has been resolved by any case cited by the Board or known to your

I.

Abuse of Administrative Discretion.

The first clear injustice in this case arises from the conduct of an administrative tribunal in repudiating a strike settlement which it approved with full knowledge of the facts, and then advancing those same facts, upon reinvestigation, as a reason for repudiation of the settlement and ensuing election and certification. It is a unique feature of this case that the Board had investigated the alleged charges of company domination and had approved withdrawal of such charges in connection with a series of formal written settlement agreements.

The decision in the instant case goes further than any prior decision in nullifying an election and certification by the Board. The decision also nullifies a contract made in reliance upon such certification. Furthermore, the decision imposes penalties upon the employer in the form of back pay.

The Board cites National Labor Relations Board v. T. W. Phillips Gas & Oil Co. (C. C. A. 3rd Cir.), 141 F. (2d) 304, 5, 6, and other cases, to the effect that the Board is not estopped from a full investigation of unfair practices where such occur subsequent to a consent election and certification.

In the instant case the Board found no subsequent unfair practice except the making of a closed shop contract which the employer was previously bound to make. In the instant case the prior facts antedating the settlement and certification were fully known to the Board before the settlement.

The purpose of the certification in the instant case was to execute a settlement and determine the bargaining agent pursuant to that settlement. The Board may not be technically estopped to make the investigation. This Petitioner simply contends that the Board has violated ordinary principles of fair dealing in holding that this

Petitioner had no right to rely upon the settlement and certification of the Board when the Board was at all times advised of the facts which it later adduced and when there has been no change in the situation of the parties. The Board, for example, knew that the Petitioner was obligated to make the closed-shop contract which is now alleged as an unfair practice, and claimed by the Board as justification for reopening the settled issues. This is sharp dealing.

But, more than that, this decision goes further than any prior decision in the imposition of penalties for reliance upon the Board's certification. It goes further than any prior decision in holding that the Board may nullify a contract made with a certified union, absent intervening misconduct.

The punitive spirit of the Board's decision appears obvious when it is realized that back pay was awarded to twelve employees who never asked to join the independent union or applied for membership. Even the independent union did not exclude them, and certainly the Company cannot be held accountable for their nonmembership. The case of these twelve is clearly covered by the decision of Hamer v. Nashawena Mills (Mass. Sup. Jud. Ct.), 32 N. E. (2d) 22, which has been so lightly dismissed by the Board's brief.

NO CASE HAS BEEN CITED BY THE BOARD WHICH HAS HELD THAT AN EMPLOYER MAY BE PENALIZED FOR ACTING UPON THE CERTIFICATION OF THE BOARD.

NO CASE HAS BEEN FOUND OR CITED WHICH HOLDS THAT THE BOARD MAY NULLIFY A CONTRACT MADE IN RELIANCE UPON THE BOARD'S CERTIFICATION, ABSENT INTERVENING MISCONDUCT.

With respect to the Board's repudiation (at the behest of a C. I. O. Union) of a strike settlement (the terms of

which were dictated by that Union) there is no precedent whatever for such conduct on the part of an administrative Board. Shall it be said that the Board will approve a closed-shop contract for a majority union, after an election, provided that union is the C. I. O., but would repudiate the election if the C. I. O. lost?

The case cited by the Board (and by the Petitioner in its brief below) which comes nearest to this situation is **Warehousemen's Union v. National Labor Relations Board**, and **National Labor Relations Board v. McKesson-Robbins** (C. C. A. D. C. 1941), 121 F. (2d) 84. In that case there had been a truce agreement and the representation was to be settled by the American Federation of Labor convention. Before submission to the convention, one of the unions withdrew from the Federation and, of course, the Federation was not then a proper arbitrator under the circumstances. Furthermore, in the Warehousemen's case, there had been no certification but only an order for an election. The Court held that there was no bar to subsequent complaint and inquiry. In our case, on the other hand, the strike settlement was carried out, and there was a certification, and it was acted upon. In our case the charges had been withdrawn and furthermore the closed shop contract was required of the employer by prior agreement.

II.

The second issue in the case, as stated by both Petitioner and the Board, requires a construction of the closed shop proviso of the Act.

The Petitioner frames this issue somewhat as follows: It is patently unjust for the Board, without substantial evidence, to hold that an employer is guilty of discriminatory intent, because the employer discharged employees in compliance with a closed shop contract, **which he was bound to make**, at the insistence of a certified union **which he was bound to recognize**.

The issue of sufficiency of the evidence of actual intent is fading from the case, because the Board's brief now tacitly concedes that it was the Independent union and not the employer which "discriminated." (The Board's decision and the opinion of the Court below proceeded on a vague implication whereby hostile motives of the Independent union were imputed to the employer.)

Some comment on this point is in order: In the argument in the Circuit Court of Appeals it was admitted by the Board (and the Court below agrees) that the employer was not in conspiracy or collusion with the Independent union in this discharge. In its present brief the Board goes one step further.

The Board Now Admits the Employer Did Not Discriminate.

No less than seven times the Board states in its brief that the **Independent union** excluded the discharged employees "because of prior union activity," or words to that effect (Board Brief pp. 2, 9, 10, 15, 17, 22, and 23). Thus the Board now tacitly admits that the discriminatory intent was the intent of the Independent union and not the intent of the employer. The complaint of the Board is therefore reduced to this: That the employer had knowledge of the intention of the Independent union to exclude, and therefore should have refused to make or enforce the closed shop clause.

But, even with this admission, the Board is still inaccurate. While the employer undoubtedly knew, in view of the history of the labor dispute, that there was a divided camp, and great hostility, between the two unions, the employer did not know how far such hostility would be pushed, or how many employees would be excluded, or whether the reasons for the hostility were due to violence during the strike or other animosities arising out of the

competition between the unions. The only individual employee mentioned in the evidence, as an object of the Independent's hostility, was Harvey Dodrill, whose case had been submitted to arbitration of the Regional Director (R. 66), and he had been reinstated by the Company following the strike. The Company considered this issue settled along with the other (R. 195).

In making the seven statements that the employees were discriminated against "because of prior union activity," the Board in its brief cites evidence in only one instance, that is, on page 10 of its brief. What is this evidence?

The first reference is R. 20, 23, which is the decision of the Board. This is, of course, not evidence.

The next reference is R. 43, which is the Second Amended Charge by the C. I. O. union, which, of course, is not evidence.

The next reference is R. pp. 263, 264. This is the testimony of William D. Griffie, one of the excluded employees, to the effect that John or "Foxy" Snyder, a member of the Independent, had told him "his reason for my being voted out was because I would not—because I were president of local 129."

Thereafter Griffie testified that he applied to the Independent for membership and was rejected, and then he was asked:

> "Q. And you have no means of knowing the reason why you were rejected, do you? A. Nothing more than what he told me.
>
> Q. What? A. He was one of the members."

That evidence is not evidence of **Company** intent.

The next reference is to pages 272, 273 of the Record, which is a stipulation as to the employees discharged. This stipulation was made at the trial between the attorneys for the Independent and the Board and consented to by counsel for the Company. It recites that 43 employees

were laid off "pursuant to the terms of a working agreement" between the Independent and the corporation; that 12 did not apply for membership, and that 31 applied for membership in the Independent and "their applications were voted upon by the members of the organization in the regular manner * * * but said applications did not receive the required number of votes to permit them to become members therein."

This is all the stipulation said. There is not even an implication that the employer knew why these employees were not members. In a letter after the layoff, to the Independent, protesting the action, the Company stated it had no knowledge of the facts (R. 87).

The next citation is to R. 297, in which witness Dodrill, an officer of the C. I. O., testified at the hearing that he had checked the cards of all parties laid off, after the layoff, and that they all belonged to the C. I. O. Even the president of the C. I. O. had to check whether they were members of the C. I. O. **There is no evidence that the Company knew at the time of the layoff about prior activities or membership of these employees in the C. I. O., or that the employer was influenced by such considerations at all.**

There is, therefore, no evidence whatever that the Company laid off these employees on account of hostility to them or to their union. The evidence is that the Company wanted to retain their employees (R. 87).

There is ample evidence of hostility among the employees. There were two rival unions. They had been engaged in a three months' strike, accompanied by violence. It would be absurd to suggest that either the Company, or the Board, or the unions involved, were unaware of this hostility. The Company had made its settlement. It was interested in "burying the hatchet," and protested the action of the Independent (R. 87, 134).

The brief of the Board therefore abandons any direct charge that the employer actually had a discriminatory

intent in discharging these employees. The position is indeed not tenable, for in the case of 12 employees, there was no act of exclusion by the union; no act of discrimination which could be imputed to the employer. The fabric of implication and imputation wholly fails at this point. The Board's punitive zeal could not reach so far.

Does a Closed Shop Permit the Majority to Exclude Members of a Rival Union?

And so the question is one of law—interpretation of the closed shop proviso. Did the Independent union have a right to exclude hostile employees after a strike and election, in which the Independent was certified as exclusive bargaining agent?

This employer was faced with the necessity of determining the rights of the Independent union. It had been forced into granting a closed shop clause. It was not then called upon nor is it now called upon to defend or advocate a closed shop. The employer decided, whether he liked it or not, that it was not the province of the employer to determine for a union whom it should admit to membership. The knowledge of hostility between the unions goes without saying. The employer protested the exclusion but it could not hazard breach of contract on the novel assumption made by the Board and by the Court below that a closed shop contract does not justify a certified union in excluding from that union elements that it judges to be hostile, members of a rival union, or otherwise.

The Board suggests in its brief that exclusion of hostile minority elements would make it necessary for employers to speculate as to which union they should support. Petitioner submits that this is exactly what an employee does in determining whether or not to join any union. Every employee who opposes a union which has or may obtain a closed shop contract exposes himself to the hazard of exclusion. The closed shop is a classical policy of labor.

devised for collective protection. It implies the right to exclude individuals. It may be right or wrong. But so long as it is legalized an employer not only cannot interfere for the benefit of the minority—he cannot be held responsible for the results—he has no option.

The case, therefore, calls for a straight-out determination whether a majority union having a closed shop contract can exclude hostile employees from its union after an election and certification. There are no cases cited by the Board which deny the right. The employer concluded that the majority had that right. The plain provisions of the Act required the employer to recognize the union and not interfere with its membership. The plain provisions of the settlement agreement required that the Independent be granted a closed shop. Did the employer have any legal right or any moral obligation to do more than protest (as it did)? The Court below suggests employer interference with membership selection by the union, prohibited by the Act, or breach of contract, which is a dangerous course in any tribunal.

In framing this issue the Board emphasizes that the employer had no right to make the closed shop contract or to enforce it, which it knew that the Independent intended to refuse membership because of prior hostilities. If the union had the right to demand a closed shop contract (which it did in this case) and if under such closed shop contract it had the right to exclude anyone it deemed hostile, then what difference would it make that the employer had knowledge of the intention to enforce such rights? The record shows that the employer objected to a strict closed shop at all times perhaps for that very reason. It is submitted, further, that most of the opposition in the controversy over the closed shop has been based upon the power of exclusion which it grants to the majority—a power to exclude the individual from employment, presumably in the interest of preservation of the group.

Even if the employer was wrong (and we submit he was right), is there any justice in imposing a penalty for relying on a certification and a contract? Even if the employer was wrong (which we do not admit), is there any reason why he should pay back pay to 12 employees who never asked to join the majority union?

The Board relies vaguely upon the purpose of the Act "to insure to employees of their right of self-organization and a free choice of representatives." But in this case the employees had an election which is not attacked or impugned. Their status was certified by the Board. There was thus no occasion in this case to invoke the above-mentioned policy. But, regardless of such considerations, no amount of enthusiasm for the policy of the Act and no amount of preference for a militant C. I. O. or dislike of local independents should be held to justify repudiation of settlements, breach of contract, and indiscriminate penalties.

Respectfully submitted,

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